LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 20 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-5104.

FRANCISCO R. RAMOS,
Petitioner,

vs.

THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, THIRD JUDICIAL DEPARTMENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

FRANCIS J. VOGT,
District Attorney, Ulster County,
Attorney for Respondent,
County Court House,
Kingston, N. Y. 12401
914 331-3315.

By:
EDWARD M. P. GREENE,
Administrative Assistant District Attorney,
Of Counsel.

Table of Contents.

	Page
Question Presented	1
Statement of the Case	1
(a) The facts	2
(b) The prior proceedings	3
POINT I. Petitioner, assisted by competent counsel, knowingly and voluntarily pleaded guilty in open court. Such a plea constituted an effective waiver of petitioner's constitutional rights and complied with every requirement of due process	5
CONCLUSION. Since there is no issue involved which reaches constitutional dimensions, there is no reason to review the case. Hence, the petition for certiorari should be denied	7

TABLE OF CASES.

	Page
Baykin v. Alabama, 395 U. S. 238, 242	5, 6
Brady v. United States, 397 U. S. 742	6
Duncan v. Louisiana, 391 U. S. 145	6
Kercheval v. United, 274 U. S. 220	6
McMann v. Richardson, 397 U. S. 759	6
People v. Buck, 25 A. D. 2d 274, cert. den. 384 U. S. 965	7
People v. Callaway, 24 N. Y. 2d 127	3
People v. Hairston, 10 N. Y. 2d 92	3
People v. Montgomery, 24 N. Y. 2d 130	3
People v. Murphy, 20 A. D. 2d 222, cert. den. 377 U. S. 971	7
People v. O'Bryan, 26 N. Y. 2d 95	3
People v. Richetti, 303 N. Y. 290, 296	6
People v. Seaton, 19 N. Y. 2d 404, 407	6
Pointer v. Texas, 380 U. S. 400	6

IN THE

Supreme Court of the United States

OCTOBER TERM 1971.

No. 71-5104.

FRANCISCO R. RAMOS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, THIRD JUDICIAL DEPARTMENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Pursuant to Rule 24 of the Revised Rules of this Court, respondent submits this brief in opposition to the above-captioned application for a writ of certiorari.

Question Presented.

The only question presented by this petition is:

Does the case involve any legal principle of general importance to the public as distinguished from the self-interest of the petitioner?

Statement of the Case.

The total inadequacy of petitioner's statement of the case prompts respondent to present to the Court a concise and accurate statement of the facts and a synopsis of the several prior proceedings in the state courts.

(a) The facts.

On October 12, 1962, petitioner entered a general store in the Hamlet of Modena, Ulster County, New York. The store owner was licensed to sell non-draught beer for consumption on the premises and the petitioner, who had resided and worked in that community for some 18 months, was known and greeted as an infrequent customer. Petitioner showed no signs of intoxication and, after buying a can of beer, chatted casually with the proprietor and his few patrons. Within minutes of his arrival and without warning, petitioner suddenly drew an automatic pistol and fired its eight rounds at the store owner and his wife. Paul Handy was killed and Emma Handy wounded.

Arrested forthwith and indicted on October 29, 1962, for first degree murder, petitioner was arraigned in Ulster County Court on November 5, 1962. Through his retained counsel, he entered a plea of not guilty and acknowledged he had no language difficulty. On November 19, 1962, his retained counsel withdrew because of petitioner's indigency and, on November 30, 1962, the County Court assigned two attorneys to the defense: a former Surrogate Judge of Ulster County and a United States Commissioner for the Southern District of New York. Both counsel were competent trial attorneys, and both were experienced in criminal law. On February 4, 1963, with his assigned counsel present in open court, petitioner withdrew his original plea and pleaded guilty to the lesser offense of second degree murder (former N. Y. Penal Law, Sec. 1046). On February 25, 1963, the Ulster County Court rendered a judgment of conviction and sentenced petitioner to an indeterminate term of 20 years to life. He is presently serving such sentence at Clinton State Prison, Dannemora, New York.

(b) The prior proceedings.

On December 15, 1969, by an application to the trial court for a writ of error *coram nobis*, petitioner alleged that his assigned attorneys had not informed him of his right to appeal and that he was unaware of such right until the New York Court of Appeals announced its decision in *People v. Montgomery*, 24 N. Y. 2d 130. The People conceded that *Montgomery* required the vacatur of judgment for the sole purpose of affording an appeal, and asked the court to reimpose the same sentence *nunc pro tunc*. The writ was granted and, at a *Montgomery*-type hearing held July 9, 1970, the Ulster County Court rendered judgment *nunc pro tunc* as of February 25, 1963, convicting petitioner upon the previous finding of guilt and resentencing him *nunc pro tunc* to the same indeterminate term.[1]

On July 11, 1970, petitioner filed a timely notice of appeal to the Appellate Division of the New York Supreme Court, Third Judicial Department. After that court assigned counsel to perfect the appeal, petitioner's conviction was reviewed on the law and facts. By an order entered February 18, 1971, the appellate court affirmed without opinion the judgment of conviction. Its decision, dated February 10, 1971, is reported at 36 A. D. 2d 690.

On June 3, 1971, after hearing oral argument, Associate Judge Bergan of the New York Court of Appeals

---

[1]At the time petitioner was convicted, there was no obligation imposed on assigned counsel to inform a defendant of his right to appeal. The rules of the four departments of the Appellate Divisions of the New York Supreme Court now mandate such a responsibility. Of course, the resentence is simply a procedural device whereby the time to appeal is reinstated (*People v. Hairston*, 10 N. Y. 2d 92; *People v. Callaway*, 24 N. Y. 2d 127; *People v. O'Bryan*, 26 N. Y. 2d 95).

certified that the case presented no question of law which warranted review by the Court of Appeals and he denied petitioner permission to appeal further.

In the interim between his conviction in 1963 and his appeal therefrom in 1970, petitioner did not remain idle. By a persistent, piecemeal process he obtained maximum review of every phase of his case from the arraignment through the imposition of sentence. It will suffice to simply sketch an outline of that process.

In 1965, petitioner first sought post-conviction relief by alleging that, due to a language barrier, he had not understood the nature of the proceedings. The Appellate Division of the New York Supreme Court affirmed the order of the Ulster County Court which denied, without a hearing, petitioner's application for a writ of error *coram nobis*; and on November 7, 1966, Chief Judge Desmond of the New York Court of Appeals denied leave to appeal further. In its decision, *People v. Ramos*, 25 A. D. 2d 791, the Appellate Division declared:

> "Appellant was adequately represented by competent counsel and despite ample opportunity to do so made no complaint to the court about any inability to understand the proceedings or to communicate with his attorney (citations omitted). At no time did he indicate the necessity for an interpreter or reaffirm his desire for a Spanish speaking attorney."

In 1967, petitioner again sought *coram nobis* relief on the ground that he had been denied due process by the coercion of his assigned counsel. Since this charge was supported only by petitioner's bare averment, the Appellate Division of the New York Supreme Court affirmed an order of the Ulster County Court which denied without a hearing petitioner's application for a writ of error *coram nobis*; and on March 7, 1968, Associate Judge

Bergan of the New York Court of Appeals denied leave to appeal further. While there is no opinion, the affirmance is reported at 28 A. D. 2d 1094.

In 1968, petitioner claimed that his assigned counsel, the trial court and the prosecutor had all conspired against him, and he sought a writ of error to examine the record of the proceedings in the County Court. This complaint was similarly supported only by a bald allegation, and again the Appellate Division of the New York Supreme Court affirmed the order of the Ulster County Court which denied petitioner's application for such a writ. On December 29, 1970, Chief Judge Fuld of the New York Court of Appeals denied petitioner permission to appeal to that court. The decision of the Appellate Division, again without opinion, is reported at 35 A. D. 2d 784.

POINT I.

Petitioner, assisted by competent counsel, knowingly and voluntarily pleaded guilty in open court.

Such a plea constituted an effective waiver of petitioner's constitutional rights and complied with every requirement of due process.

A plea of guilty "is more than a confession which admits that the accused did various acts; it is itself a conviction [and] nothing [else] remains but to give judgment and determine punishment" (*Boykin v. Alabama*, 395 U. S. 238, 242). Evidencing, as it often does, a definite trial strategy, the plea bespeaks of the accused's intention not to litigate the issue of his guilt, and necessarily involves the surrender of certain constitutional rights, including the right to confrontation, the privilege against self-incrimination and the right to trial by jury

(*Brady v. United States*, 397 U. S. 742; *Pointer v. Texas*, 380 U. S. 400; *McMann v. Richardson*, 397 U. S. 759; *Duncan v. Louisiana*, 391 U. S. 145).

It has long been recognized that a guilty plea must be made intelligently and knowingly to have validity (*Kercheval v. United*, 274 U. S. 220). *Boykin* added the further requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea voluntarily with a full understanding of the consequences thereof. In that connection, *Boykin* also noted (*supra*, 395 U. S. at 244, fn. 6) that the State of New York requires that there appear affirmatively in the record an effective waiver of defendant's right to plead not guilty (*People v. Seaton*, 19 N. Y. 2d 404, 407).

Turning to the case at bar, the record leaves little doubt that the trial judge canvassed the matter with petitioner to make sure the defendant had a full understanding of the purpose of his plea and of its consequence. In sharp contrast to the record, the petition falls far short of an evidentiary showing that petitioner entered his plea under coercion from anyone. Instead, we have only vague, equivocal allegations of "abuses" of constitutional rights and a tripartite "conspiracy." It is strikingly significant, the People urge, that nowhere has petitioner protested his innocence.

Moreover, a presumption of regularity attaches to the prior proceedings. In *People v. Richetti*, 303 N. Y. 290, 296, the New York Court of Appeals said:

> "The very existence of the judgment of conviction in and of itself gives rise to a strong presumption of regularity—a presumption that those charged with the administration of justice have performed their duties properly. Such a presumption will give way only to substantial contrary evidence."

When a defendant offers only his own unsupported allegation, he fails to submit "substantial contrary evidence" and does not meet his burden of proof (*People v. Buck*, 25 A. D. 2d 274, cert. den. 384 U. S. 965). Under such circumstance, the People have no duty to establish the contrary (*People v. Murphy*, 20 A. D. 2d 222, cert. den. 377 U. S. 971).

CONCLUSION.

Since there is no issue involved which reaches constitutional dimensions, there is no reason to review the case.

Hence, the petition for certiorari should be denied.

Respectfully submitted,

FRANCIS J. VOGT,
District Attorney, Ulster County,
Attorney for Respondent.

By EDWARD M. P. GREENE,
Administrative Assistant District Attorney,
Of Counsel.

November 20, 1971.